No. 03-187

IN THE

Supreme Court of the United States

AURORA NATIONAL LIFE ASSURANCE COMPANY AND NEW CALIFORNIA LIFE HOLDINGS, INC.,

Petitioners,

v.

SIERRA NATIONAL INSURANCE HOLDINGS, INC. AND GEORGIA LEE, AS RECEIVER FOR SIERRA NATIONAL INSURANCE HOLDINGS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent attempts to trivialize the issue presented in the petition by characterizing it as a "claim of procedural error." Opp. 8. The issue in this case is one of constitutional dimension: whether the Ninth Circuit exceeded its judicial power by reaching the substantive issues in a proper collateral order appeal while expressly refusing to address a challenge to its Article III jurisdiction. This Court frequently grants certiorari to resolve conflicts concerning the Article III limits on the powers of federal courts. Robert L. Stern et al., *Supreme Court Practice* 252-54 (8th ed. 2002) (citing cases).

Respondent does not dispute that the Ninth Circuit's express refusal in this case to fulfill its Article III obligation in a proper collateral order appeal conflicts with decisions of the Second and Tenth Circuits. Respondent's four arguments that this recurring and important conflict does not warrant this Court's review are without merit.[1]

1. Sierra does not even attempt to refute that the panel's decision below squarely conflicts with the holdings of *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999), and *Timpanogos Tribe* v. *Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002). Indeed, Sierra concedes that the panel below expressly rejected Aurora's argument that the court had pendent appellate jurisdiction over standing issues under *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995). Opp. 7. The panel's interpretation of *Swint* directly contradicts *Merritt* and *Timpanogos Tribe*. See Pet. 11-13.

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[1] Sierra makes a point of emphasizing – twice – that two other defendants in this case have been indicted on federal criminal charges. Opp. 1, 6. The only defendants who have appealed or petitioned this Court, however, are Aurora, a California insurance company that continues to provide over $5 billion in coverage to policyholders, and New California, Aurora's parent. Aurora and New California have *not* been indicted.

Instead, Sierra contends that the undisputed conflict is unworthy of this Court's review because the panel's decision is unpublished. Opp. 20. If that were correct, however, then this Court would never grant certiorari with respect to unpublished decisions that involve circuit conflicts, which it plainly does. See Pet. 22-23 (citing grants of certiorari to review unpublished decisions).

Sierra simply ignores that the petition's question presented sets forth a fundamental issue of federal court power that five circuits (the Second, Sixth, Ninth, Tenth, and Eleventh circuits) have addressed with expressly conflicting results in six decisions from 1996 through 2003. See Pet. 11-14 & n.8.[2] This recurring conflict over an issue of fundamental importance to appellate review warrants review by this Court.

Sierra also asks this Court to ignore the conflict because "[t]he Ninth Circuit's recent *published* cases confirm that it addresses issues of Article III jurisdiction *when appropriate*." Opp. 20 & n.10 (second emphasis added) (citing *Meredith* v. *Oregon*, 321 F.3d 807, 816 (9th Cir. 2003), and *Kyocera Corp.* v. *Prudential-Bache Trade Services, Inc.*, Nos. 01-15630 et al., 2003 WL 22025130, at n.12 (9th Cir. Aug. 29, 2003) (en banc)). Respondent's very characterization shows that the Ninth Circuit's approach is discretionary – reviewing

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[2] Sierra weakly suggests that the Eleventh Circuit, which (like the Ninth Circuit here) has refused to address Article III jurisdiction as a threshold matter on proper collateral orders appeals, "might well reach a different result if it were to face the question in the future." Opp. 21; *see* Pet. 13-14 (discussing *Moniz* v. *City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998), and *Summit Med. Assocs., P.C.* v. *Pryor*, 180 F.3d 1326, 1334-36 (11th Cir. 1999)). This contradicts *Summit*, where the court expressly declined to reexamine the issue, noting that the question was "governed" by its "unambiguous precedent" in *Moniz*. *Summit*, 180 F.3d at 1335-36. Moreover, Sierra's contention makes no sense because the only basis for the Eleventh Circuit to reconsider its position would be *Vermont Agency*. But Sierra's view of *Vermont Agency* is that it does not foreclose a circuit court from treating Article III jurisdiction issues in interlocutory appeals as discretionary.

Article III jurisdiction only "when appropriate" – in conflict with the mandatory approach followed in the Second and Tenth Circuits.

Neither Ninth Circuit decision cited by Sierra supports the proposition that the Ninth Circuit recognizes an *obligation* to address Article III jurisdiction issues in proper collateral order appeals. *Kyocera* was not an interlocutory appeal and, indeed, did not involve any jurisdictional issues.

Meredith cannot support Sierra's proposition because petitioners twice brought it to the attention of the Ninth Circuit in this case (in a letter pursuant to Fed. R. App. P. 28(j) and in their petition for rehearing and suggestion for rehearing en banc, see Pet. 17 n.10), but that court nevertheless refused to address the Article III standing issue in this case. Instead, the Ninth Circuit specifically held that it is "discretionary" whether a court of appeals must resolve a question of Article III jurisdiction in a proper collateral order appeal. Pet. App. 3a n.1. Moreover, the language in *Meredith* concerning Article III is *dicta* because that case did not involve a collateral order appeal and did not involve standing. *Meredith* involved an interlocutory appeal of a preliminary injunction granted by the district court, and the panel in that case held that in addition to resolving the merits of the preliminary injunction, it also would resolve whether the district court should have abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971).

Ultimately, Sierra acknowledges, as it must, that the courts of appeals have held almost unanimously that Article III jurisdiction issues must be addressed at the threshold of all kinds of interlocutory appeals, including 28 U.S.C. § 1292(a) appeals of injunction orders and § 1292(b) certifications. Opp. 21; see Pet. 16-19. Sierra contends that the panel's contrary opinion does not warrant this Court's review because of the "*unanimity*" in the federal courts. Opp. 21 (emphasis in original). Quite the opposite, however, such unanimity demonstrates that the panel's decision was plainly erroneous

and should be summarily reversed, or at least that review should be granted. See Sup. Ct. Rule 10(a) (a ground for granting a petition for certiorari is that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"); accord Stern, *supra* at 252-53.

2. Sierra argues that the panel's decision does not conflict with *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Opp. 18-19. Sierra's argument is unavailing.

Sierra asserts that "*Vermont Agency* did not hold that a Court of Appeals *must* address the merits of the plaintiff's standing in every interlocutory appeal." Opp. 19 (emphasis added) (citing Pet. App. 3a n.1). Sierra, however, fails to address, much less refute, petitioners' analysis demonstrating that this Court in *Vermont Agency* left no doubt that a federal appellate court's mandatory obligation to examine Article III jurisdiction applies to a proper collateral order appeal. Pet. 8-11. Specifically, in the *Vermont Agency* opinion, 529 U.S. at 771, this Court cited its decision in *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998), in support of its threshold examination of standing on a collateral order appeal. In *Steel Co.*, this Court held that a federal appellate court has a duty to examine its Article III jurisdiction "*without exception*" on "*every* writ of error or appeal," and that this duty is imposed by Article III. 523 U.S. at 94-95 (emphases added). This Court's reliance on *Steel Co.* demonstrates that *Vermont Agency* can only mean that federal appellate courts have an unflagging obligation to examine their Article III jurisdiction on proper collateral order appeals, just as they do on all other writs and appeals.

Alternatively, Sierra asserts that any inconsistency between the panel's decision below and *Vermont Agency* does not warrant this Court's attention because "this Court does not sit simply to correct errors by lower courts." Opp. 19. This assertion overlooks the fact that lower court decisions that are

"clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary," are classic candidates for summary reversal. Stern, *supra* at 316.

Sierra also contends that *Sell* v. *United States*, 123 S. Ct. 2174 (2003), "confirms" that the Ninth Circuit did not err in declining to address standing below. Opp. 10. *Sell* cannot carry the weight that Sierra attaches to it. *Sell* involved a collateral order appeal in which the majority did not address standing, but the dissent did exactly what petitioners argue must be done: it identified a potential issue with respect to the petitioner's Article III standing and stated that the court of appeals "should address this jurisdictional issue on remand." 123 S. Ct. at 2188 n.3 (citing *Steel Co.*). The majority did not disagree. The fact that the majority opinion of this Court did not address the standing issue hardly "confirms" the propriety of the Ninth Circuit's approach that a court of appeals has power to refuse to address an expressly-raised Article III jurisdictional issue in a proper collateral order appeal. As an initial matter, where a majority opinion of this Court does not address a jurisdictional issue, it is *not* precedent on that jurisdictional issue. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989).

Moreover, the United States did not challenge the petitioner's standing in *Sell*. Accordingly, *Sell*, at most, implicitly supports the notion that this Court is not obligated to address standing issues *sua sponte*; it provides no support for the notion that courts of appeal may expressly refuse to decide standing challenges raised by the parties to a proper collateral order appeal, as occurred here. In any event, to the extent that there is any implicit tension between *Sell* and *Vermont Agency*, that provides all the more reason for the Court to grant the petition. Stern, *supra* at 234-35 (citing numerous instances in which certiorari has been granted in part to resolve tension between prior decisions of this Court).

3. Most of Sierra's response is an attempt to confuse the question presented by the petition. Opp. 9-16. The question presented is whether the Ninth Circuit erred in expressly ruling that Article III does not require a court of appeals to address standing. It is not the very different question, on which the Ninth Circuit refused to express an opinion, of whether Sierra has a legally cognizable interest under California law sufficient for standing.

If the Court takes certiorari over the question presented, it is unlikely even to address whether Sierra has standing. This is because this Court has discretion not to address an alternative ground for affirmance, especially when it was not addressed below. *Green Tree Fin. Corp. – Ala.* v. *Randolph*, 531 U.S. 79, 92 n.7 (2000) (declining to reach proposed alternative ground for affirmance because not decided below); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249 (1999) (per curiam) (same).[3]

In any event, Sierra is wrong in both of its contradictory contentions that its standing turns on disputed facts and is "unquestionabl[e]." Opp. 9, 16. Sierra's standing is a pure legal question. As Sierra concedes, in order to allege Article III standing, Sierra must allege the violation of a "'judicially cognizable interest.'" Opp. 12 (quoting *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997)). Sierra also concedes that because its

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[3] Moreover, Sierra's contention that it has standing might not qualify as an alternative ground for affirmance in this Court. This Court can only affirm on an alternative ground "so long as it does not change the judgment." Stern, *supra* at 444; *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). Here, the panel's judgment below was that it would not address standing. Pet. App. 3a n.1. A ruling that Sierra has standing – the ruling Sierra requests from this Court – arguably would alter or expand the judgment below. As a result, requesting such a ruling might have required a cross-petition, which Sierra did not file. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed"); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (same).

only remaining claim is for tortious interference under California law, it must allege violation of an interest cognizable under California law. *Id.*

The critical authority defining whether Sierra has a judicially cognizable interest in this context is *In re Pacific Standard Life Ins. Co.*, 12 Cal. Rptr. 2d 50 (Cal. Ct. App. 1992). Significantly, Sierra does not dispute that *Pacific Standard* held that a disappointed bidder in a California insurance conservation proceeding lacks standing to appeal, even if the losing bidder asserts tortious conduct by the winner. Opp. 14 ("Sierra is not appealing the Commissioner's decision to award ELIC to defendants and, under *Pacific Standard*, could not have done so."). Thus, the standing issue in this case is a purely legal one: whether the language and logic of *Pacific Standard* applies to standing to bring new lawsuits, or is limited to standing to appeal. That question of law does not turn on any factual issues. None of the continuing discovery on the substantive issues in this case, or the evidence presented at a trial, could possibly have any bearing on interpreting *Pacific Standard*.[4]

It is irrelevant to the question presented to this Court which side's interpretation of *Pacific Standard* is correct. Nonetheless, Sierra seeks to construe *dicta* in *Pacific Standard* to argue that "[t]he reason [the disappointed bidder] had no 'cognizable interest' in the decision . . . was that the Commissioner's decision, and the confirming order of the Conservation Court, had '*no* res judicata effect' on any claim the plaintiff might have against the winning bidder 'for tortious interference with [its] purported contract' with the Commissioner." Opp. 14 (quoting *Pacific Standard*). Sierra's argument ignores that *Pacific Standard*'s explanation

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[4] Sierra notes that Aurora relied on materials outside of the complaint in the District Court, Opp. 4-5, but Aurora used these materials to address the issues of immunity, causation, and damages, not the proper interpretation of *Pacific Standard*. Pet. App. 9a n.4, 40a-41a.

of why a disappointed bidder in an insurance conservation has "no legally cognizable interest" has nothing to do with res judicata.

The core holding of *Pacific Standard* is that the "requirement of judicial authorization and prescription of terms fatally attenuated *whatever interest, whether present or prospective*, [the disappointed bidder] claimed to have in the purchase of [the failed company]." 12 Cal. Rptr. 2d at 54 (emphasis added). Under *Pacific Standard*, Sierra's "interest *ended* with the court's authorization to sell [the insurance company] to another suitor." *Id.* at 55 (emphasis added). That rationale and language are just as applicable to a losing bidder's subsequent lawsuit – based on a "prospective interest" brought after any such "interest ended" – as they are to its appeal. *Pacific Standard* only discussed res judicata in order to reject the disappointed bidder's alternative argument that the Conservation Court had created standing by stating in dictum that the losing bidder would lose a lawsuit for "tortious interference." *Id.* at 54.

Ultimately, it would contradict any rational notion of public policy if disappointed bidders lacked standing to appeal but could bring collateral attacks years after the conservation against the new, rehabilitated insurance company. As part of a conservation, as in this case, most of the policyholders of the failed company become policyholders of the new, rehabilitated company. As in this case, none became policyholders of the losing bidder. Allowing the losing bidder to bring a potentially crippling lawsuit against the new company therefore could only injure the persons who became policyholders of the rehabilitated company – the very persons who are supposed to be protected by an insurance conservation.[5] For this reason, the National Organization of

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[5] Sierra attempts to spin certain comments at oral argument in the Ninth Circuit from outside litigation counsel for the Commissioner. Opp. 15. The Commissioner's *amicus* brief to the Ninth Circuit states: "[T]he

Life and Health Insurance Guaranty Associations – which guarantee insurance coverage for millions of policyholders in all 50 states – filed an *amicus* brief in the Ninth Circuit arguing that Sierra lacks standing. See *Amicus* Brief of National Organization Of Life And Health Insurance Guaranty Associations, at 5, Nos. 02-55193, 02-55259 (9th Cir. filed May 28, 2002) ("Sierra lacks any legally cognizable interest on which Sierra may base its claims in this case").[6]

Finally, Sierra is wrong in asserting that the decision in *Korea Supply Co.* v. *Lockheed Martin Corp.*, 63 P.3d 937 (Cal. 2003), "confirmed that a party in Sierra's position has standing to bring a claim for intentional interference under California law." Opp. 15. *Korea Supply* did not involve an insurance conservation and hence the court did not address either *Pacific Standard* or Cal. Ins. Code § 1037, the statute upon which *Pacific Standard* is based.[7]

4. Sierra argues that this case is "[n]ot [r]ipe [f]or [r]eview" because "Aurora can challenge Sierra's standing in

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Commissioner expresses no view on whether Sierra has standing to base its claims of injury on defendants' fraud against the Commissioner." *See Amicus* Brief Of Insurance Commissioner Of The State Of California, at 6, Nos. 02-55193, 02-55259 (9th Cir. filed July 22, 2002).

[6] In a related appeal, the Ninth Circuit certified questions of the standing of the California Attorney General to bring state-law civil claims for conservation-related alleged wrongs to the California Supreme Court as a matter of "comity," because the issues were undecided under California law, and because the policy issues implicated by such standing questions are "appropriately within the ken of the California Supreme Court." *California ex rel. RoNo, LLC v. Altus Fin. S.A.*, No. 02-56038, 2003 WL 22119896, at *5-*7 (9th Cir. Sept. 15, 2003). Similar concerns are present here. They suggest that, on a remand, Sierra's standing also would be certified to the California Supreme Court.

[7] Sierra also cites decisions from the federal courts of appeals holding that disappointed bidders in various types of transactions have standing to bring RICO and other claims. Opp. 13. None of these decisions, however, involved standing under California law, much less standing arising out of a California insurance conservation.

an appeal from the final judgment." Opp. 17-18. This argument is sophistry. The question presented by this petition is whether the Ninth Circuit exceeded its judicial power by refusing to address Article III jurisdiction *on a proper collateral order appeal*, *not* whether Sierra has standing. The Court can only review the question presented *now*, by granting review of the decision on the collateral order appeal itself. If the case proceeds to final judgment and there is an appeal of that judgment, this Court plainly could not entertain the by-then moot question whether the first panel was obligated to address Article III jurisdiction on the earlier collateral order appeal. Accordingly, the interlocutory posture of this case is essential to review by this Court of the recurring and important question presented by the petition.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, the petition should be granted, or alternatively, this Court should summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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